FOR ARGUMENT

862a

PRINTED COPY

18pgs

(18)

No. 06-989

Supreme Court, U.S.
FILED
DEC - 3 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MICHAEL T. GARONE*
MICHAEL A. COHEN
JAY T. WALDRON
SARA KOBAK
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue
Suites 1600-1900
Portland, OR 97204-3795
(503) 222-9981

Counsel for Petitioner

* Counsel of Record

December 3, 2007

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening, reply and supplemental briefs remains correct.

TABLE OF CONTENTS

	Page
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
ARGUMENT	2
I. AMPLE AUTHORITY EXISTS OUTSIDE THE FAA TO ENFORCE THE AGREEMENT'S JUDICIAL REVIEW PROVISION	2
A. The FAA Does Not Limit Courts' Authority To Enforce Agreements For Judicial Review Of Arbitration Awards	2
B. The Judicial Review Provision Is Enforceable As A Matter Of Federal Law	4
C. Federal Common Law Applies, But The Agreement's Judicial Review Provision Is Enforceable Even If Oregon Law Applies	6
II. IN AGREEING TO ARBITRATE, THE PARTIES DID NOT RELY ON THE FAA FOR ENFORCEMENT OF THEIR JUDICIAL REVIEW PROVISION	8
III. HALL STREET DID NOT WAIVE RELIANCE ON AUTHORITIES OUTSIDE THE FAA	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Burlington N. R.R. v. Woods, 480 U.S. 1 (1987) 4
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) ... 6
Gasperini v. Ctr. for Humanities, 518 U.S. 415 (1996) 6
Halvorson-Mason Corp. v. Emerick Constr. Co., 745 P.2d 1221 (Or. 1987) 7
Harrell v. Travelers Indem. Co., 567 P.2d 1013 (Or. 1997) 8
Hanna v. Plumer, 380 U.S. 460 (1965) 4, 6
Kaiser Found. Health Plan v. Doe, 903 P.2d 375 (Or. Ct. App. 1995), *adh'd to as modified on recons.*, 908 P.2d 850 (1996) 8
Kleine v. Catara, 14 F. Cas. 732 (C.C.D. Mass. 1814) 6
Ky. River Mills v. Jackson, 206 F.2d 111 (6th Cir. 1953) 3
Link v. Wabash R.R., 370 U.S. 626 (1962) ... 5, 6
Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932) 2, 10
People by Abrams v. Terry, 45 F.3d 17 (2d Cir. 1995) 4
Rueda v. Union Pacific Railroad, 175 P.2d 778 (Or. 1946) 8
Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468 (1989) 3
Wilko v. Swan, 346 U.S. 427 (1953), *overruled on other grounds by Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 3

STATUTES

28 U.S.C. § 651 *et seq.* 5

TABLE OF AUTHORITIES – continued

	Page
28 U.S.C. § 1652	4
28 U.S.C. § 2072	4
2003 Or. Laws, Ch. 598, § 31	7
2003 Or. Laws, Ch. 598, § 57	7
Or. Rev. Stat. §§ 36.300 *et seq.* (2001) (repealed 2003)	7
Or. Rev. Stat. §§ 36.600 *et seq.* (2003)	7
RULES	
D. Or. L. R. 16.4(e)(1)(A)	4
Fed. R. Civ. P. 16(c)(9)	4
SCHOLARLY AUTHORITY	
Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39 (1999)	9
OTHER AUTHORITY	
Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Arbitration Act* (2000)	7

INTRODUCTION

Mattel asserts that this case involves an application to confirm or vacate an arbitration award under §§ 9-11 of the Federal Arbitration Act ("FAA"). Based on that premise, Mattel asserts that (i) the FAA provides the exclusive grounds for vacatur, and (ii) if it does not, state law applies and bars enforcement of the Arbitration Agreement's judicial-review provision. Mattel is wrong in all respects.

This is not a proceeding for confirmation and judicial review under FAA §§ 9-11. Neither party ever moved for confirmation under § 9. Instead, this case is a federal district court action in which the court entered as its order the parties' stipulation to arbitrate certain issues with legal-error review. The court entered and enforced that order pursuant to its authority under the Federal Rules of Civil Procedure ("Federal Rules"), the District of Oregon Local Rules ("Local Rules"), and its inherent authority. Had the district court needed additional power, federal common law – not state law – governs and mandates enforcement of the judicial-review provision. And even if state law applies, the judicial-review provision still is enforceable.

The Ninth Circuit refused to enforce the court's order implementing the judicial-review provision only because the Ninth Circuit viewed the FAA as prohibiting such agreements. Because the FAA is no impediment, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. AMPLE AUTHORITY EXISTS OUTSIDE THE FAA TO ENFORCE THE AGREEMENT'S JUDICIAL REVIEW PROVISION.

A. The FAA Does Not Limit Courts' Authority To Enforce Agreements For Judicial Review Of Arbitration Awards.

In its supplemental brief, Mattel again urges this Court to conclude that the FAA prohibits judicial review of arbitration awards beyond the grounds prescribed under §§ 10 and 11. The premise of Mattel's argument is that this case is a proceeding to enforce or vacate an award under the FAA. That premise is wrong. Moreover, Mattel has failed to establish that the FAA imposes any such prohibition.

At oral argument, Mattel conceded that nothing in the FAA prohibits the enforcement of legal-error review provisions. Oral Arg. Tr. 45:3-9; 47:14-18 (counsel for Mattel) ("[The FAA] still let the parties have the review through common law if they want it."). Mattel now contends, however, that the FAA prohibits legal-error review whenever parties agree that a judgment may be entered on an arbitration award. Resp. Supp. Br. 6-7. Citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932), Mattel argues that any agreement for entry of judgment is necessarily an agreement for confirmation under § 9. Resp. Supp. Br. 6. But *Marine Transit* does not support that proposition. In *Marine Transit*, this Court concluded that the parties agreed to confirmation under § 9 because the "agreement for arbitration stipulated that the award should be 'final and binding.'" *Id.* at 276. Here, the parties expressly stipulated – and the court ordered – that the award would *not* be final and binding, but instead subject to

the district court's review for legal error. Pet. App. 15a-16a, ¶¶ 24, 27. In effect, the parties opted out of §§ 9-11.

Mattel urges this Court to disregard the unambiguous Agreement and court order because the judicial-review provision is severable. *See* Resp. Supp. Br. 6 n.3. But the Ninth Circuit severed the Agreement's judicial-review provision only because it erroneously concluded that the FAA prohibits parties from agreeing to arbitration with legal-error review. *See* J.A. 141. No severability issue exists unless the judicial-review provision is unenforceable.

The judicial-review provision is enforceable. The FAA does not confine parties to the enforcement and judicial-review provisions under §§ 9-11. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989) (FAA does not reflect congressional intent to occupy entire field of arbitration); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953) (discussing benefits of arbitration under FAA "or on standards otherwise created"), *overruled on other grounds by Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Parties may agree to – and courts may enforce – arbitration under different terms, including arbitration that is non-binding on legal issues. Pet. Br. 16-30; Pet. Reply Br. 3-14. *See also, e.g., Ky. River Mills v. Jackson*, 206 F.2d 111, 120-21 (6th Cir. 1953) (common-law enforcement). Even the grounds for vacatur under the FAA are supplemented by federal common law, such as the manifest disregard of the law and public policy exceptions. Pet. Br. 24-25.

In this case, the parties clearly conditioned confirmation of the award upon judicial review for legal error. The FAA does not bar enforcement of that agreement.

B. The Judicial Review Provision Is Enforceable As A Matter Of Federal Law.

Mattel argues that if the FAA does not prohibit enforcement, state law governs whether the Agreement is enforceable under the Rules of Decision Act ("RDA"), 28 U.S.C. § 1652. *See* Resp. Supp. Br. 7. Mattel is incorrect.

1. The district court had authority to enforce the Agreement's judicial-review provision under Federal Rule 16, Local Rule 16.4, and the court's inherent powers. Pet. Supp. Br. 10-14. The Rules Enabling Act ("REA"), 28 U.S.C. § 2072, commands that those federal rules – rather than state law – apply so long as the rules are constitutional and a valid exercise of this Court's authority under that statute. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *see Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987); *People by Abrams v. Terry*, 45 F.3d 17, 23 (2d Cir. 1995) (rule of *Erie* does not apply to court's inherent authority to manage orderly disposition of cases).

Mattel contends that the district court lacked authority under Federal Rule 16 and Local Rule 16.4 to enforce the parties' agreement for arbitration with legal-error review. Resp. Supp. Br. 12-16. Mattel focuses on the fact that the Arbitration Agreement was not an agreement to place the case before a special master under Rule 53. *Id.* at 14-15. But Rule 53 is just one case-management tool available under the Federal Rules.

Rule 16 and Local Rule 16.4 provide district courts with broad discretion to utilize different methods of alternative dispute resolution. *See* Fed. R. Civ. P. 16(c)(9); D. Or. L. R. 16.4(e)(1)(A).

Arbitration subject to legal-error review falls within the scope of those rules. Although Mattel stresses that neither Rule expressly authorizes orders enforcing arbitration agreements, Resp. Supp. Br. 15, those Rules give district courts both the authority and the flexibility to approve and enforce parties' agreements for alternative dispute resolution through the application of normal court processes. *See Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (discussing court's inherent authority).

2. Mattel also argues that the Alternative Dispute Resolution Act ("ADRA"), 28 U.S.C. § 651 *et seq.*, prohibits district courts from referring cases to arbitration when – as in this case – the amount in controversy exceeds $150,000. That restriction does not apply here because, as Mattel acknowledges, "the idea of proceeding to arbitration was initiated by the parties themselves and *not* the district court." Resp. Supp. Br. 16. The ADRA exemplifies Congress's encouragement of alternative dispute resolution; it does not restrict parties' freedom to elect such methods as an alternative to litigation. Moreover, if Mattel were correct that the ADRA prohibits arbitration here, then the proper outcome would be to vacate the judgment of the court of appeals and remand to litigate the underlying lease dispute in the district court.

The Federal Rules, the Local Rules, and the court's inherent powers authorized the district court's order implementing the parties' agreement for arbitration with legal-error review. Acceptance of Mattel's claims to the contrary would mark an abrupt and unwarranted departure from the well-settled rule that courts

have authority to manage their own dockets "to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31.

C. Federal Common Law Applies, But The Agreement's Judicial Review Provision Is Enforceable Even If Oregon Law Applies.

Even if the Federal Rules and the district court's inherent powers were insufficient to enforce the Agreement's judicial-review provision, both federal and state common law authorize its enforcement.

1. Under the RDA, federal courts sitting in diversity apply state substantive law and federal procedural rules in the absence of a specific, guiding statute or rule. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). State laws are substantive when they are "outcome determinative" in the sense that a federal court failing to apply the state law would either (1) encourage forum shopping, or (2) cause an inequitable administration of the laws. *Hanna*, 380 U.S. at 467-68. By this standard, the judicial-review provision approved by the district court, which is litigant-neutral, is not substantive and federal law applies. *See Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 437-38 (1996) (limit on jury awards is substantive and state law applies, while standard of appellate review is procedural and federal law applies). And, as Mattel acknowledges, the federal common law of arbitration permits judicial review of arbitration awards for legal error when parties so provide. *Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) (Story, J.).

2. Even if state law governed the enforceability of the Agreement's judicial-review provision, Oregon law would not preclude its enforcement.

The standards for judicial review under the Oregon Arbitration Act ("OAA")[1] mirror the standards under FAA §§ 10 and 11. Mattel contends that the OAA prohibits parties from deviating from the statutory grounds for judicial review if the parties have agreed that a judgment may be entered on an arbitration award. Resp. Br. 10-11. This argument, like Mattel's analogous argument under the FAA, is without merit.

The Oregon Supreme Court has held expressly that Oregon's arbitration statute does not displace the common law of arbitration. *Halvorson-Mason Corp. v. Emerick Constr. Co.*, 745 P.2d 1221, 1224 (Or. 1987). Indeed, Oregon

---

[1] The Oregon Arbitration Act, *former* Or. Rev. Stat. §§ 36.300 *et seq.* (2001), was repealed in 2003. 2003 Or. Laws, Ch. 598, § 57. Mattel wrongly suggests that the successor statute – the Oregon Uniform Arbitration Act ("OUAA"), Or. Rev. Stat. §§ 36.600 *et seq.* (2003) – would apply if Oregon law governs the enforceability of the judicial-review provision. Resp. Supp. Br. 8-9. This action was commenced before the OUAA's effective date. 2003 Or. Laws, Ch. 598, § 31.

Mattel also is wrong that the OUAA prohibits legal-error review of arbitration awards. The OUAA is modeled after the Uniform Arbitration Act ("UAA"). The comment to § 23 of the UAA states that "parties remain free to agree to contractual provisions for judicial review of challenged awards on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses." Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Arbitration Act*, § 23, cmt. (B)(5) (2000); *Id.* at § 4, cmt. (5)(e) (notwithstanding UAA's prohibition on waiving or varying effect of listed vacatur standards, "parties can add appropriate grounds that are not in the statute").

courts repeatedly have instructed that parties are free to "mak[e] an enforceable agreement to arbitrate outside the purview of the statute." *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375, 382 (Or. Ct. App. 1995), *adh'd to as modified on recons.*, 908 P.2d 850 (1996). Indeed, in *Rueda v. Union Pacific Railroad*, 175 P.2d 778 (Or. 1946), the Oregon Supreme Court confirmed that common-law arbitration awards may be set aside for errors of law, *id.* at 788, and that parties are free to arbitrate and seek judicial review as a matter of contract. *Id.* at 791.

Moreover, a public policy must be clear and "overpowering" before Oregon courts will invalidate a contract provision on that ground. *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1020 (Or. 1997). Because neither the OAA nor any other statute articulates any policy against judicial review of arbitration awards, the Agreement's judicial review provision is enforceable under Oregon common law.

II. IN AGREEING TO ARBITRATE, THE PARTIES DID NOT RELY ON THE FAA FOR ENFORCEMENT OF THEIR JUDICIAL REVIEW PROVISION.

Contrary to Mattel's supplemental arguments, the parties did not rely on the FAA for enforcement of the Agreement's judicial-review provision. The record is clear that the parties expressly *eschewed* FAA or "statutory" arbitration in favor of "contract" arbitration with legal-error review. *See* J.A. 46.

Faced with that clear record, Mattel notes that the parties, in reporting that they had reached agreement to arbitrate, cited a law review article that "discusses" judicial review under the FAA. Resp.

Supp. Br. 16. But even if such a reference could overwhelm all procedural history showing that the parties did not intend to proceed under §§ 9-11, *see* Pet. Supp. Br. 1-8, the article itself argues that judicial-review provisions are enforceable contracts not prohibited by the FAA. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 84-85 (1999). The parties' citation to that article suggests nothing more than that they viewed their Agreement for non-statutory judicial review as a valid and enforceable contract.

Mattel also claims that the parties' incorporation of FAA § 7 into the Agreement is evidence that they relied solely on the FAA for enforcement of the judicial-review provision. *See* Resp. Supp. Br. 17. To the contrary, the parties' reference shows that they understood the need specifically to incorporate § 7 to provide the arbitrator with subpoena power because they were opting out of the FAA's procedural provisions.

Mattel further maintains that the parties relied solely on the FAA for enforcement of the judicial-review provision because the Agreement authorizes confirmation and entry of judgment on the award. Resp. Supp. Br. 17-18. The Agreement, however, establishes procedures which differ significantly from those prescribed under §§ 9-11. The Agreement provides that the court "may" enter judgment on the award, but "shall" vacate, modify or correct any award that contains legal error. Pet. App. 16a, ¶27. If the parties intended to rely on §§ 9-11 to authorize judicial review and enforcement of the award, they would have simply incorporated those provisions as they did § 7, or otherwise manifested their intent that

the award be "final and binding." *See Marine Transit*, 284 U.S. at 276.

Finally, Mattel argues that the parties' subsequent litigation positions reveal reliance on the FAA as the sole source of authority for enforcement of the judicial-review provision. Resp. Supp. Br. 18-20. That argument is belied by Mattel's arguments before the district court. When a dispute arose over the timeliness of Hall Street's motion to vacate, Mattel asserted:

> At its core, the arbitration procedure is a matter of contract between the parties. The parties agree upon a set of rules to govern the resolution of their dispute. Having consented to those rules, neither the parties nor the Court should rewrite the contract after the outcome is decided.

J.A. 5, Docket # 73, at 14. Although the parties cited the FAA (as well as Labor Management Relations Act arbitration cases) in arguing by analogy on issues unrelated to judicial review, the parties never asserted that §§ 9-11 governed confirmation and review of the award.

III. HALL STREET DID NOT WAIVE RELIANCE ON AUTHORITIES OUTSIDE THE FAA.

Mattel contends that Hall Street waived reliance on any authority outside of the FAA for enforcing the Agreement's judicial-review provision. Resp. Supp. Br. 20-23. Mattel's contention is predicated on its mischaracterization of Hall Street's petition for *certiorari* and the question presented.

Mattel acknowledges that Hall Street argued below that the FAA does not preclude enforcement of the

Agreement's judicial-review provision and that the arbitration occurred under the district court's Rule 16 authority. Resp. Supp. Br. 21. Mattel suggests, however, that Hall Street abandoned that position in its petition for certiorari because, according to Mattel, Hall Street asserted that "the FAA itself permits the parties to contract for 'expanded judicial review.'" *Id.*

Hall Street did not frame the question as whether the FAA "itself permits" the Agreement's judicial-review provision. Instead, Hall Street framed the question in terms of the Ninth Circuit's holding; Hall Street asked only whether the FAA precludes enforcement of the judicial review provision. Pet. Supp. Br. 7-8. Hall Street always has acknowledged that legal-error review is "more expansive" than the grounds for vacatur identified in FAA §§ 10-11. But it did not seek vacatur under the FAA; nor did the district court rely on the FAA in reviewing the arbitration award. Hall Street asked this Court to decide whether the FAA bars enforcement of the judicial-review provision. Hall Street has always maintained that, if the FAA is not a barrier, the provision is otherwise enforceable.

Hall Street also has never abandoned reliance on the district court's supervisory role and on general contract principles for enforcement of the judicial-review provision. In its "Statement of the Case" Hall Street explained that "[t]his case involves the Ninth Circuit's refusal to enforce the clear and unambiguous terms of the parties' arbitration agreement, an agreement that was entered into with district court approval after the commencement of this litigation." Pet. 2 (emphasis added); see also id. 8-9. Critically, Hall Street explained that the lower court erred in assuming that the FAA provided authority for the Agreement's enforcement:

> Nowhere does the legislative history assert that an agreement to arbitrate *must be enforced only in accordance with the FAA* or that a court is precluded from enforcing a contract on its own terms if the contract expands on the FAA's terms.

Id. 23 n.13 (emphasis added); *see also id.* 25 (characterizing the Agreement as a waiver of the procedures set forth in FAA §§ 9-11).

In sum, Hall Street never waived reliance on authority outside the FAA for enforcing the Agreement's judicial-review provision. The Ninth Circuit identified the FAA as the sole barrier to enforcement. Hall Street, accordingly, asked this Court to decide whether the FAA precluded enforcement – a question that is necessarily based on the premise that the provision was otherwise enforceable. As shown above and in Hall Street's other briefs, ample authority exists outside the FAA for enforcing the Agreement's judicial-review provision.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MICHAEL T. GARONE*
MICHAEL A. COHEN
JAY T. WALDRON
SARA KOBAK
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue
Suites 1600-1900
Portland, OR 97204-3795
(503) 222-9981

Counsel for Petitioner

* Counsel of Record

December 3, 2007